

PURPLE COMMUNICATIONS, INC. and Its)		
Successor and Joint Employer CSDVRS, LLC)		
d/b/a ZVRS,)		
)		
Employers,)	Case Nos.	21-CA-149635
)		28-CA-179794
and)		21-CA-182016
)		32-CA-185337
PACIFIC MEDIA WORKERS GUILD,)		21-CA-185343
LOCAL 39521, THE NEWSPAPER GUILD,)		27-CA-185377
COMMUNICATIONS WORKERS OF)		27-CA-186448
AMERICA, AFL-CIO,)		28-CA-186509
)		21-CA-187642
Charging Party.)		28-CA-192041
)		27-CA-192084
)		28-CA-197009
)		28-CA-197062
)		

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GLOSSARY OF ABBREVIATIONS

ALJ	Administrative Law Judge
Board	National Labor Relations Board
CBA	Collective Bargaining Agreement between Purple Communications, Inc. and the Pacific Media Workers Guild, Local 39521, The Newspaper Guild, Communications Workers of America, AFL-CIO
Charging Party or union or CP	Pacific Media Workers Guild, Local 39521, The Newspaper Guild, Communications Workers of America, AFL-CIO
FCC	Federal Communications Commission
LMRA	Labor Management Relations Act
NLRA or Act	National Labor Relations Act
Purple or company	Purple Communications, Inc.

INTRODUCTION

This case is not about “perjury,” “alternative facts,” “brib[ery],” or “work[place] terrorism.” CP CE Br. at 6. Respondents and their workforces stand together in opposing all those things. The question before the Board should be more fundamental: whether, based on the administrative record, the employer and its employees, acting in concert or choosing to refrain from doing so, could (and did) effectively negotiate the terms and conditions of employment. The union insists, however, that the Board ignore the record, the allegations, and even the Board’s own jurisdiction to find ex post facto violations of labor, criminal, and sometimes national security laws.¹ But the notion that the Board can suddenly hear a broad swath of never-before-made allegations and find employers liable for violations of laws that are totally outside the regulatory reach of the Board is entirely alien to Board proceedings and a dangerous threat to constitutional due process.

That threat is only the beginning of the problems with the union’s 96 cross-exceptions. The union cannot really believe the foundational premises of most of its cross-exceptions: it did not file unfair labor practice charges in connection with the assertions underlying its cross-exceptions; nor did it go through the normal procedural channels required before seeking relief from the Board. Had the union done so, it would have had to answer for why many or most of the legal violations it alleges are well outside the Board’s jurisdiction. The union does not provide an answer in its cross-exceptions because the union’s supporting brief merely restates or paraphrases some, but not all, of its cross-exceptions without an accompanying argument. That will not do.

¹ Aside from the substantive problems with the union’s cross-exceptions, the claimed legal violations fall under statutory regimes wholly distinct from and outside the scope of the Act. *See, e.g.*, 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 2331 (terrorism); 18 U.S.C. § 201 (bribery of public officials and witnesses).

The Board cannot and would not decide cross-exceptions where doing so “exceeds its delegated powers or ignores [its] statutory mandate.” *J.P. Stevens Emps. Educ. Comm. v. NLRB*, 582 F.2d 326, 328 (4th Cir. 1978). Any action to the contrary would deprive Purple of the ability to defend itself against charges that were never filed or allegations in a complaint that was never issued.

Even if one were to assume that the Board has jurisdiction to decide the union’s cross-exceptions, the union’s filings fall significantly short of the civility and principled argumentation that the Act requires of Board proceedings. The union would have the Board eviscerate the long-established distinction between an employer’s business decisions and an employee’s personal decisions about the terms and conditions of employment. The union then would have the Board castigate administrative law judges for failing to find employers guilty of “brib[ery],” “fraud,” “perjury,” and, worse yet, “terrorism.” CP CE Br. at 5-6. The union also would expect the Board to make fact findings without any support from the record, to speculate about facts where the record is limited, and to assume that employers act with “deliberate and vicious” intent if they act at all. CP CE Br. at 12. Finally, the union would demand that the Board issue a shockingly overbroad punitive order that strips away Purple’s business revenue and penalizes the deaf and hard-of-hearing community that Purple serves by depriving Purple of its operating revenue.

In all events, the union’s abusive and unsupported cross-exceptions suggest that only one disposition is correct here: the Board should exercise its sound discretion and summarily dismiss each and every one of the union’s cross-exceptions to ensure the integrity of these proceedings.

ARGUMENT

I. The Union’s Cross-Exceptions Regarding Purple’s Electronic Communication Policy Are Factually, Legally, and Logically Unsupportable.

The union devotes the majority of its cross-exceptions brief to attempting to refute an argument no one has made. The union suggests that Purple’s electronic communication policy

does not violate the Act. CP R. Br. at 5-7. Purple agrees; after all, it promulgated the policy in the first place. From the undisputed premise that Purple’s electronic communication policy lawfully restricts distributing “non-business material” on the company’s internet, voicemail, and email systems, the union contends that such non-business material must necessarily exclude any activity covered by Section 7 of the Act. CP CE Br. at 3-5. That conclusion does not remotely follow. To the contrary, as the Supreme Court made clear in *First National Maintenance Corp. v. NLRB*, an employer’s business materials do not extend to an employee’s personal grievances regarding the terms and conditions of employment any more than a union’s direct dealings with its members. 452 U.S. 666, 676-77 (1981) (distinguishing business decisions from decisions regarding union and labor costs). While such grievances and dealings can be protected by the Act, they have never been considered a part of the business enterprise: “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.” *Id.* at 676.

To the extent the union also asserts that the ALJ erred by failing to find “that there is widespread [sic] unrestricted use of [Purple’s] electronic communications equipment,” CP CE Br. at 1, there is absolutely no support for such a finding in the record. Nor did the complaint allege “widespread unrestricted use” upon which a finding could be made. *Cf.* Complaint ¶ 5(a). In all events, such a finding would be irrelevant to the only question before the Board concerning Purple’s electronic communication policy: whether by *maintaining* its electronic communication policy, Purple violated the Act. The Board never has required—in fact, expressly disavowed—inquiring into how a work rule, such as the policy here, is applied in deciding whether the maintenance of the work rule violates the Act. *Cf. Purple Commc’ns, Inc.*, 361 N.L.R.B. 1050, 1066 (2014) (distinguishing maintenance of neutral work rule from discriminatory application of

rule); *cf. also Guard Publ'g Co. d/b/a Register-Guard*, 351 N.L.R.B. 1110, 1118-19 (2007) (same).

At bottom, nothing in the record, the law, or even logic supports the union's exceptions regarding Purple's electronic communication policy.

II. The Union's Cross-Exceptions to the ALJ's Remedial Order Have No Basis in Law.

The union's cross-exceptions only confirm that the ALJ's remedial order, which requires the company to remit dues to the union without recouping any amount from employees, exceeded the scope of the Board's remedial power. Rather than stop there, the union makes the extraordinary and unprecedented assertion that the Act not only enables but also *requires* the Board to order employers to (i) host "food displays"; (ii) "reimburse[] the cost of . . . paper"; (iii) interfere with other regulatory agencies that administer entirely unrelated statutes (i.e., the FCC); (iv) post five-year notices; and (v) forfeit business revenue as *punishment* for labor law violations. CP CE Br. at 12-13.

Such requirements are so far removed from the Act's remedial purpose that they undermine the plain language of Section 10 itself. *See* 29 U.S.C. § 160(c) (providing make-whole remedy to "effectuate the policies of [the Act]"). In fact, the Supreme Court has long been clear: remedies of any kind "should be construed in harmony with the spirit and remedial purposes of the Act," because the Board's "power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938). In other words, the Board may only order a make-whole remedy when an employer or union violate the Act.

The make-whole remedy here would not and could not include the punitive remedies that the ALJ recommends or that the union seeks in its cross-exceptions. *Republic Steel* confirms that the Board does not have the power to design remedies with "the effect of deterring persons from violating the Act." 311 U.S. at 12. Whatever the Board's holding in *Alamo Rent-A-Car*, 362

N.L.R.B. No. 135 (2015), CP R. Br. at 2, neither the ALJ nor the union can change Section 10(e)’s remedial purpose. Yet, the union asks the Board to craft whatever remedy—no matter how punitive—the union can conceive, contrary to the Supreme Court’s express instruction that the “authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose.” *Consol. Edison*, 305 U.S. at 235-36.

Adding insult to injury, the union would have the Board design a remedial order that requires employer payments to the union through subsidized “food displays,” “the cost of . . . paper,” and of course employer-paid union dues. CP CE Br. at 12-13. Such an order would violate the LMRA, which broadly prohibits employer payments to any union unless to remit dues to the union “*deducted from the wages of employees* in payment of membership dues in a labor organization.” 29 U.S.C. § 186(c)(4) (emphasis added). In its reply brief to Respondents’ exceptions, the union insists that Section 302(c)(2) of the LMRA allows employer payments to unions to satisfy court orders—which apparently would include court-enforced Board orders. CP R. Br. at 2 (citing *Alamo*, 362 N.L.R.B. No. 135, slip op. at 1 n.1), 4. Yet, that conclusion renders the other sections of Section 302, including Section 302(c)(4), meaningless. No statute—not the LMRA, not even the NLRA—gives an agency the authority to decide when the statute has or has not been violated simply by dint of administrative voluntarism. But that sort of voluntarism is precisely what the union asks the Board to interpret into the LMRA (a statute the Board lacks jurisdiction to enforce) as part of the remedial order in this case.

In short, the union’s desired remedial order is manifestly inconsistent with the Act. Punishing employers and their entire business enterprise—as the union asks the Board to do—would desecrate the Act’s long-recognized definition of a *remedial* order. The Board thus cannot

sustain the union's cross-exceptions regarding the ALJ's recommended remedial order any more than the ALJ's order itself.

III. The Union's Exceptions to the ALJ's Other Findings Should Be Summarily Dismissed.

The union uses the remainder of its brief to paraphrase some, but not all, of its 96 cross-exceptions. The union cites only a single case in its entire brief in support of its cross-exceptions: *Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014), which provides no support for any of the union's cross-exceptions—not even those related to Purple's electronic communication policy. For good reason. Most of the union's cross-exceptions ask the Board to decide issues that were not alleged in the complaint and that are so far outside the Board's jurisdiction that not even a fiction writer's creative reinterpretation of the Act could fathom them without ignoring the plain language, the legislative history, and nearly a century of precedent. On some allegations (e.g., joint-employer and successor status, the electronic media policy), the parties entered into a stipulation for the limited purposes of the Act. These stipulations, which are part of the record, obviated the need for additional findings. *See* JT-30; JT-99; JT-100; JT-101. On other allegations, the union's cross-exceptions far exceed the scope of the complaint.

In most respects, the union's cross-exceptions are Federal Rule of Civil Procedure 11-type filings that waste the Board's limited resources. The Board's limited resources would be put to better use interpreting and enforcing the nearly century-old statute that Congress authorized it to administer than to encourage frivolous, and often verbally abusive, cross-exceptions like those the union filed here. At bottom, the union's cross-exceptions indefensibly shortchange the civility and principled decisionmaking that the Act designed Board proceedings to advance. Each and every one of the union's cross-exception thus should be summarily dismissed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Board deny and summarily dismiss the union's 96 cross-exceptions.

Dated: January 18, 2018

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2018, I caused a copy of the foregoing Respondents' Answering Brief to the Cross-Exceptions of the Charging Party to be served, via the NLRB e-filing system and electronic mail, on the following:

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